BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LINDSEY N. MILLER Claimant V. **MED STAFF, LLC** Respondent AND **TECHNOLOGY INSURANCE COMPANY** Insurance Carrier	)	Docket No. 1,072,603

ORDER

STATEMENT OF THE CASE

Claimant requested review of the June 8, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Scott J. Mann of Hutchinson, Kansas, appeared for claimant. Katie Black of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ previously found claimant's December 10, 2014, accident did not arise out of or in the course of her employment with respondent because she was on her way home from work when the accident occurred. The ALJ focused on the application of K.S.A. 2013 Supp. 44-508(f)(3)(B), or "going and coming" rule, at that time and did not consider whether the accident was caused by a neutral risk, a personal risk, or an idiopathic cause. In its Order of May 7, 2015, the Board reversed and remanded the ALJ's original decision, finding claimant sustained an accident arising out of and in the course of her employment with respondent because driving was intrinsic to claimant's employment.

The ALJ since found claimant failed to sustain her burden of proving personal injury by accident arising out of and in the course of her employment with respondent because the cause of her accident is unknown, or idiopathic. The ALJ wrote, "There is no evidence before the court of a causal connection between the conditions under which the claimant's work as a nurse is required to be performed and the resulting accident."[1]

[1] ALJ Order (June 8, 2015) at 3.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 5, 2015, Preliminary Hearing and exhibits; the transcript of the February 17, 2015, Preliminary Hearing and exhibits; the transcript of the February 18, 2015, continuation of Preliminary Hearing/deposition of claimant and exhibits; and the transcript of the February 18, 2015, continuation of Preliminary Hearing/deposition of Brenda Otto and exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues both respondent and the ALJ are precluded from reopening an issue that was previously determined based on the doctrine of the law of the case. Claimant contends the Board found she sustained an accident arising out of and in the course of her employment with respondent in its Order of May 7, 2015, and the Board's finding was not clearly erroneous nor did it cause manifest injustice. Additionally, claimant argues she met her burden of proving a causal connection between her work conditions and the resulting accident because, as previously found by the Board, her accident occurred while traveling in the course of her employment.

Respondent maintains the ALJ's Order should be affirmed. Respondent argues the ALJ's finding that claimant's accident likely arose from an idiopathic cause addresses a separate issue than the "going and coming" rule and should not be precluded based on the doctrine of the law of the case. Respondent maintains the cause of claimant's accident is idiopathic and is therefore noncompensable pursuant to K.S.A. 2014 Supp. 44-508(f)(3)(A).

The issues for the Board's review are:

1. Does the doctrine of "law of the case" bar re-litigating the issue of whether claimant sustained an accident arising out of and in the course of her employment with respondent?

2. If not, did claimant sustain an accident arising out of and in the course of her employment with respondent?

FINDINGS OF FACT

Respondent is a temporary staffing agency. Brenda Otto, respondent's owner, operates the business from her home in Otis, Kansas. Ms. Otto testified respondent contracts with medical facilities throughout Kansas to provide certified nursing assistants, certified medical assistants, licensed practical nurses and registered nurses for temporary placement for the facilities. When a position becomes available, Ms. Otto will notify her employees. Employees may opt to accept an available position; an employee will not be terminated for declining an open position. Ms. Otto explained employees are never scheduled to appear at her office. Instead, employees are expected to appear at the

assigned work location. Employees are required to provide personal transportation. Respondent provides mileage reimbursement for its employees at the rate of 30 cents per mile for up to 200 miles round trip. Employees earn an hourly rate while on a job but are not paid an hourly rate while traveling. Ms. Otto explained employees are not required to car pool, and employees do not receive additional mileage reimbursement for transporting co-workers. Ms. Otto testified an employee will remain at the assigned job site for the entirety of the shift.

Claimant, a registered nurse (RN), began employment with respondent as a traveling nurse in September 2014. Claimant received $34 per hour while working as an RN. Claimant did not receive any fringe benefits from respondent. Claimant agreed she was expected to provide personal transportation, and she was not paid an hourly rate while traveling to and from work assignments. Claimant was provided a mileage reimbursement for travel from her home to the work site. Claimant testified she was not required to travel from work site to work site during a single shift.

Claimant accepted an RN position at Locust Grove, a nursing home in LaCrosse, Kansas, in October 2014. Claimant worked full-time at Locust Grove filling the night nurse position, a shift scheduled from 6:00 p.m. to 6:00 a.m. Locust Grove is located approximately 36 miles from claimant's home in Larned, Kansas, and claimant testified she drove a direct route in her personal vehicle to and from the facility. Claimant indicated she was not allowed to leave the premises during her shift. Locust Grove preferred the consistency of claimant's services and requested that respondent assign only claimant for the night nurse position. Claimant worked solely at Locust Grove, on behalf of respondent, from October through December 10, 2014.

At approximately 7:15 a.m. on December 10, 2014, claimant suffered multiple injuries as the result of a motor vehicle accident while traveling home from Locust Grove. According to the Kansas Motor Vehicle Accident Report, claimant was driving her fiancé's 2004 Chevrolet Avalanche truck south on U.S. Route 183 on a foggy morning when she crossed the center line of the highway, drove onto the opposite shoulder and over-corrected, causing the vehicle to turn and roll over multiple times.[2] Claimant testified she was traveling the most direct route between Locust Grove and her home, and she was not performing any duties related to her work at the time of the accident. Claimant has no recollection of events leading up to, during, or immediately following the accident.

Records indicate claimant was admitted at Wesley Medical Center in Wichita, Kansas, on the day of the accident. Claimant explained her injuries:

> I know I was on life support for 10 days. Um, I had pneumo thorax. I had numerous broken ribs. I had two to three fractures in my back. I had a shattered pelvis which

[2] See P.H. Trans. (Feb. 17, 2015), Cl. Ex. 1.

> they ended up doing surgery on. Um, I had a dislocated hip, left hip. Dislocated right shoulder. And at the time, it was later on, that we figured out about my knee. I have a tear of the ACL, PCL, and MCL [of the left knee].[3]

Claimant remained at Wesley Medical Center until her release in February 2015.

A preliminary hearing was held before the ALJ on June 5, 2015, to gather additional evidence related to the cause of claimant's accident. Claimant testified she had completed her shift and was not performing her duties as a nurse while driving her personal vehicle to her personal home on December 10, 2014. Claimant stated, "I remember leaving work, it was foggy and I had to stop on 183, and that was the last thing I remember, besides waking up in the hospital."[4] The Kansas Motor Vehicle Accident Report completed by Trooper Hemken shows it was foggy and the road surface was wet on the morning of the accident.[5]

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-508 states in part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
> . . .
>
> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
> . . .

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[3] Miller Depo. at 17.

[4] P.H. Trans. (June 5, 2015) at 8.

[5] See P.H. Trans. (Feb. 17, 2015), Cl. Ex. 1.

> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
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> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
>
> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[7]

ANALYSIS

1. Does the doctrine of "law of the case" bar re-litigating the issue of whether claimant sustained an accident arising out of and in the course of her employment with respondent?

The "law of the case" doctrine has long been applied in Kansas and is generally described in 5 Am.Jur.2d, Appellate review, § 605 in the following manner:

> The doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a discretionary policy which expresses the practice of the courts generally to refuse to reopen a matter already decided,

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[6] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[7] K.S.A. 2014 Supp. 44-555c(j).

> without limiting their power to do so. This rule of practice promotes the finality and efficiency of the judicial process. The law of the case is applied to avoid indefinite relitigation of the same issues, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of the lower courts to the decisions of appellate courts.

The ALJ's June 5, 2015, Order denying compensation is not barred by the "law of the case" doctrine. The March 11, 2015, Order involved an interpretation of the "going and coming" rule. In this appeal, the ALJ determined the claim arose out of an idiopathic cause, which is a separate and distinct issue from that involved in the March 11, 2015, Order and resulting appeal.

2. Did claimant sustain an accident arising out of and in the course of her employment with respondent?

Claimant worked a 12-hour shift immediately preceding the accident giving rise to this claim. The Kansas Motor Vehicle Accident Report compiled by Trooper Hemken indicates there were foggy and wet road conditions on the morning of the accident. Claimant testified it was a dreary and foggy morning, and the fog was bad enough to cause her to pull her car over on Highway 183. This is the last thing she remembers.

The ALJ wrote in his Order, "There is no evidence before the court of a causal connection between the conditions under which the claimant's work as a nurse is required to be performed and the resulting accident."[8] In the prior Board Order in this case, the undersigned found claimant sustained an accident arising out of and in the course of her employment with respondent on December 10, 2014.[9] In *Bennett*, the Kansas Court of Appeals noted the fact Mr. Bennett was "driving the employer's vehicle in the course of his employment subjected him to the additional risk of travel."[10] Claimant was subjected to the risk of driving on a foggy roadway because of her employment with respondent.

The undersigned has twice found that a claimant losing concentration or falling asleep while driving does not constitute a personal risk or an idiopathic cause within the meaning of K.S.A. 2014 Supp. 44-508(d), stating, "losing concentration while driving or driving without the benefit of enough sleep is a risk common to and distinctly associated with all employments that require employees to drive vehicles."[11] In *Roush*, the claimant

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[8] ALJ Order (June 8, 2015) at 3.

[9] *Miller v. Med Staff, LLC*, No. 1,072,603, 2015 WL 3642465 (Kan. WCAB May 7, 2015).

[10] *Bennett v. Wichita Fence Co.,* 16 Kan. App. 2d 458, 460, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992).

[11] *Stoker v. Dustrol, Inc.,* No. 1,065,785, 2013 WL 6920092 (Kan. WCAB Dec. 5, 2013); *Roush v. Rent-A-Center, Inc.,* No. 1,062,983, 2013 WL 1876358 (Kan. WCAB Apr. 15, 2013).

did not know if she lost concentration or fell asleep. In *Stoker*, which is similar to this case, the claimant had no recollection of what caused her to cross the center of the road and collide with a tractor-trailer.

In *Braun*,[12] a Board Member followed *Roush* and *Stoker* in a case where the claimant could not remember what caused her to drive off the road, although it was suspected and found she suffered a syncopal event. In *Braun*, the Board member wrote, "[C]laimant's employment required her to operate a motor vehicle, which is a work risk, not a personal risk. If claimant had not been driving a vehicle as required by her employment, her syncopal episode would not have caused the accident."[13]

The Board has been consistent in its interpretation of the post May 15, 2011, version of K.S.A. 44-508(f)(3)(A)(iv). To apply the statute as suggested by the ALJ, no unwitnessed work-related accident involving a head injury with associated memory loss would be compensable. The undersigned finds driving through a dense fog after working a 12-hour shift, crossing the center line onto the left shoulder of the highway and over-correcting the vehicle causing it to veer off the road and roll over, does not arise out of an idiopathic cause, neutral risk or personal risk. The evidence supports a finding the accident was caused by a combination of bad road conditions and long work hours.

CONCLUSION

Claimant has met the burden of proving she suffered a work-related injury by accident arising out of and in the course of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated June 8, 2015, is reversed and remanded with directions to rule on claimant's request for temporary total disability and medical compensation, including, but not limited to, authorization of medical treatment and payment of past medical expenses, prescriptions and mileage.

IT IS SO ORDERED.

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[12] *Braun v. State of Kansas*, No. 1,072,426, 2015 WL 4071488 (Kan. WCAB June 12, 2015)

[13] *Id.* at 5.

Dated this _____ day of August, 2015.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
smann@mannlawoffices.com
cbarr@mannlawoffices.com

Katie Black, Attorney for Respondent and its Insurance Carrier
kblack@mvplaw.com
mpennington@mvplaw.com
mvpkc@mvplaw.com

Bruce E. Moore, Administrative Law Judge